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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 514

CENTRAL-STATES CORPORATION, *Petitioner,*

v.

FRANK LUTHER, TRUSTEE OF THE ESTATE OF GARDEN GRAIN AND SEED COMPANY, INC., BANKRUPT, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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SUBJECT INDEX

	Page
Opinions Below: Majority Opinion	12
Dissenting Opinion	25
Jurisdictional Statement	2
Questions Presented	2
Statement	3
Reasons for Granting Writ	5
Conclusion	11
Appendix A: Opinions, Judgment and Order of the Court of Appeals for the Tenth Circuit	12
Appendix B: Kansas G. S. 34-248 (1949)	29
Appendix C: Order Extending Time to File Petition for writ of Certiorari	30

TABLE OF CASES

In Re Burton Coal Co., 7 Cir. 126 F. (2d) 447	5
In Re Bolognesi and Company, 264 F. 770, 773-774 (CCA 2d 1918)	9
Carson State Bank v. Grant Grain Co., 50 N.D. 558, 197 N.W. 146	7
Cunningham v. Brown, 265 U.S. 1, 13; 68 L. Ed. 873, 877; 44 S. Ct. 424, 427 (1923)	10
Empire State Surety Company v. Carroll, 194 F. 593, 605 (CCA 8th 1912)	9
Hall v. Pillsbury, 43 Minn. 33, 149; 24 N.W. 699	7
In Re International Power and Securities Corp., 174 F. (2d) 399	5
Kastner v. Andrews, 49 N.D. 1059; 194 N.W. 824, 827-829	7
Kipp v. Goffe & Carkener, 144 Kan. 95, 58 P. (2d) 102 (1936)	8
Smith v. Elevator Co., 9 Kan. App. 144, 58 Pac. 483 (1899)	8
State v. Farmers Elevator Co., 59 N.D. 679, 231 N.W. 725, 727	6
Torgenson v. Quinn-Shepherdson Co., 161 Minn. 380, 201 N.W. 615	8

STATUTES CITED

28 U.S.C. Sec. 1254(1)	2
Kansas G.S. 34-248 (1949)	7, 29

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CENTRAL-STATES CORPORATION prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled cause on August 13, 1954.

OPINIONS BELOW

The memorandum opinion of the Referee in Bankruptcy (R. 10-23) is unreported. The District Court Judge filed no opinion but merely entered an order sustaining the judgment entered by the Referee in Bankruptcy (R. 23-24). The opinion of the Court of Appeals is reported in 215 F. (2d) 38, and it is set forth in Appendix A to this peti-

tion, *infra* p. 12. A dissenting opinion, also appended to this petition in Appendix A, *infra* p. 25, was filed by Circuit Judge John C. Pickett.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on August 13, 1954, *infra* p. 28. A petition for rehearing filed on August 27, 1954, was denied on September 7, 1954, *infra* p. 28. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1). On December 6, 1954, this Court entered an order extending the time for filing a petition for certiorari in the instant cause to and including January 5, 1955. Appendix C, *infra* p. 30.

QUESTIONS PRESENTED

1. Does the Bankruptcy Court have jurisdiction to enter an order directing the petitioner to turn over certain quantities of grain allegedly belonging not to the bankrupt estate but to grain depositor-creditors of the bankrupt's estate?

2. Grain having been purchased by the petitioner from the bankrupt warehouseman on November 14, 1951, in good faith and for full value, and partial deliveries having been made by the bankrupt to the petitioner between December 12, 1951, and January 7, 1952, did the Bankruptcy Court, in the light of the fluctuating condition of the bankrupt's grain accounts during the periods specified, properly order an accounting by the petitioner as of November 14, 1951?

3. Are public warehouse receipts issued on a prescribed statutory form void, invalid, or unenforceable because they were not "registered" and because the petitioner, who purchased them in good faith and for full value, did not physically deposit any grain as recited in the said receipts but erroneously assumed that the said grain was deposited for the petitioner by the warehouseman?

4. Regardless of the provisions of a local statute relating to the issuance of warehouse receipts for the deposit of grain, is not a Bankruptcy Court required to apply the first-in first-out rule to the moneys in a bankrupt warehouseman's account for the purpose of tracing into a commingled grain fund in possession of such a warehouseman the sums paid by the petitioner for the purchase and acquisition of grain?

5. Since, as established by the uncontradicted evidence and as found by the Court of Appeals, the petitioner paid to the bankrupt over two hundred thousand dollars for grain at times when the balance in the bankrupt warehouseman's sole bank account was negligible and since almost all of the said moneys so paid were used by the bankrupt warehouseman to purchase grain for its own account, was the petitioner entitled to have a constructive trust or an equitable lien impressed upon the grain fund which ultimately came into the possession of the Trustee in Bankruptcy?

6. Did the Court of Appeals depart from the accepted and usual course of judicial proceedings and prejudice the rights of the petitioner in certain other suits now pending by including in its opinion certain erroneous conclusions which are not based upon the record or upon the findings or memorandum of opinion of the trial court and which were never even contended for by the respondent?

STATUTES INVOLVED

The pertinent statutory provisions are printed in Appendix B, *infra*, p. 29.

STATEMENT

An involuntary petition in bankruptcy was filed against Garden Grain and Seed Company, Inc., a Kansas corporation (hereinafter referred to as the "bankrupt") on January 16, 1952. An order of adjudication was entered on

January 18, 1952, and the cause was on that date referred generally to a Referee in Bankruptcy. On July 14, 1952, the petitioner filed a reclamation petition in the instant cause praying, among other things, that it be allowed an equitable lien on certain milo grain or the proceeds thereof in the possession of the respondent (R. 27-34). An answer was filed by the respondent admitting that the petitioner was entitled to a common claim in the sum of $220,875.71 but denying all of the allegations of the reclamation petition by which the petitioner sought to establish an equitable lien or a priority claim in any form (R. 46-47). Thereafter the respondent filed an "Action in the Nature of an Interpleader," praying (1) that the Court adjudge, decree, and declare the owners and respective proportions of ownership of the various claimants to the funds in the hands of the respondent arising from the sale of milo, and (2) that the Court specifically find that the petitioner has no interest in said funds. After a full hearing before the United States Referee in Bankruptcy for the District of Kansas on November 25, 1952, the respondent filed an amendment to his answer requesting that the petitioner account for certain milo purchased, received, and paid for in full by it in good faith within the four-month period prior to the entry of the order of adjudication in bankruptcy herein (R. 47-48). To this amendment the petitioner filed a motion to strike (R. 51).

The Referee in Bankruptcy on March 25, 1953, entered an order based upon findings of fact, a memorandum opinion, and conclusions of law denying that petitioner was entitled to an equitable lien or priority claim, directing the petitioner to turn over (a) 867,191 pounds of milo purchased, received, and paid for as aforesaid by the petitioner, or in lieu of such milo (b) the monetary value thereof fixed at $19,771.95, and allowing the petitioner a general claim in the sum of $239,259.56 upon the condition that said 867,191 pounds of milo or the monetary value thereof be turned over to the bankrupt estate (R. 10-23). A petition for review having been filed (R. 1-23), the

United States District Judge for the District of Kansas entered an order on October 13, 1953, sustaining the judgment of the Referee in Bankruptcy (R. 23-24). On appeal to the Court of Appeals for the Tenth Circuit the judgment was sustained (*infra* p. 28) but a dissenting opinion was filed by Circuit Judge John C. Pickett with respect to the propriety of the said turnover order (*infra* p. 25).

REASONS FOR GRANTING THE WRIT

1. As to Questions 1 and 2:

As pointed out by Circuit Judge Pickett in his dissenting opinion, this is the first bankruptcy proceeding in which it has ever been held that a turnover order may properly be entered with respect to property which belongs to third parties and which "will not in the slightest degree affect the assets of the bankrupt." *In Re Burton Coal Co.*, 7 Cir. 126 F. (2d) 447, and *In Re International Power and Securities Corporation*, 174 F. (2d) 399, relied on by the majority, involved reorganization proceedings and are otherwise distinguishable factually. While it is true that the petitioner made no objection to the jurisdiction of the trial court, none was necessary; for what is involved here is a question of jurisdiction over the subject matter and not merely over the parties. So far as this particular point is concerned, this is definitely a case of first impression involving an important question of bankruptcy law which has not been, but should be, settled by this Court. If the decision below is sustained, the old clear-cut distinction between summary and plenary proceedings will be to a large extent obviated and bankruptcy courts generally may be burdened with the adjudication of innumerable side issues having only a remote connection with the administration of bankrupt estates.

Even if it be assumed that the trial court did have jurisdiction, its disposition of the issue raised by the turnover order was patently in conflict with all applicable local decisions on the subject. The petitioner purchased certain

quantities of grain from the bankrupt warehouseman on November 14, 1951. The first partial delivery was made on December 12, 1951, and certain other partial deliveries were made between that date and January 7, 1952. The petitioner had paid, in good faith and at full value, for warehouse receipts evidencing all of the grain so delivered and additional larger quantities of undelivered grain. All of the warehouse receipts in question were on a prescribed statutory form. Under the circumstances the petitioner contended below that it was entitled to retain all of the grain received by it. The Referee in Bankruptcy held, however, that since a shortage existed in the bankrupt warehouseman's accounts and since in his opinion the warehouse receipts were invalid, the petitioner must account for any shortage as of November 14, 1951, the date of purchase. On that date, using the criteria adopted by the Trustee, the bankrupt warehouseman's position was long to the extent of 1,013,159 pounds, or 867,191 pounds less than the quantity actually delivered to the petitioner. On November 28, 1951, the date of a second transaction between the bankrupt warehouseman and the petitioner, the bankrupt warehouseman was long to the extent of 5,578,416 pounds. On December 12, 1951, the date of the first delivery, the bankrupt warehouseman was long 1,382,973 pounds. These figures are based on Schedule 16 appearing at page 247 of the record. In compiling them, the same criteria as those employed by the Trustee have been used.

All of the applicable State decisions hold that although a purchaser of grain, upon accepting delivery from a warehouseman who at the time is short in his grain account, is liable to the depositors of grain for the amount in excess of his pro rata share, such liability will be extinguished if, subsequent to the excessive delivery, other grain is substituted therefor and made a part of the commingled mass. Under such circumstances title to the substituted grain is deemed vested in the depositors and holders of warehouse receipts. *State* v. *Farmers Elevator Co.*, 59 N.D. 679, 231

N. W. 725, 727; *Carson State Bank* v. *Grant Grain Co.*, 50 N.D. 558, 197 N. W. 146; *Kastner* v. *Andrews*, 49 N.D. 1059, 194 N. W. 824, 827-829; *Hall* v. *Pillsbury*, 43 Minn. 33, 149, 24 N. W. 699. Although Schedule 16, which is uncontradicted, clearly shows that the bankrupt's position was at least temporarily improved subsequent to November 14, 1951, that date was arbitrarily chosen for the accounting. Even Circuit Judge Pickett in his dissenting opinion failed to take said Schedule 16 into consideration and erroneously concluded that the evidence did not disclose the condition of the bankrupt warehouseman's grain account after delivery to the petitioner. The State decisions cited are all in conflict with the holding of the trial court and the Court of Appeals but even if they did not exist, as a matter of equity and sound judicial practice, November 14, 1951, should not have been selected as the date for an accounting.

2. As to Question 3:

The Court of Appeals ruled that the warehouse receipts issued to the petitioner were invalid and unenforceable because they had not been "registered." This conclusion was based upon Kansas G.S. 34-248 (1949). (See Appendix B below.) In its opinion the Court of Appeals summarized all of the provisions of this statute, save the following:

> "Provided, That at the option of the chief inspector, a public warehouseman may issue *unregistered* negotiable receipts for grain of which the warehouseman is not the owner, either solely, jointly, or in common with others." (Italics supplied).

Since the warehouse receipts here in question were issued under the authority of the language quoted, and since each of them bore the caption, "Uniform Unregistered Bailment Local Public Warehouse Receipts," it is difficult to understand by what logic the Court of Appeals determined that the receipts were required to be registered. In further substantiation of its conclusion the Court of Appeals held that the instant cause was "by appropriate

analogy" subject to the holding in *Kipp* v. *Goffe & Carkener*, 144 Kan. 95, 58 P. (2d) 102 (1936). In that case it was held that *unlicensed* warehousemen had no authority to issue warehouse receipts and that one who dealt with an unlicensed warehouseman did so at his peril. The decision was designed to enforce the announced public policy of Kansas requiring all warehousemen to obtain licenses and to post an adequate bond under the appropriate statute. In the instant cause the bankrupt warehouseman was licensed, had posted the required bond, and had issued warehouse receipts on the prescribed statutory form. In the *Kipp* case itself the Supreme Court of Kansas was careful to distinguish the facts before it from those in *Torgenson* v. *Quinn-Shepherdson Co.*, 161 Minn. 380, 201 N. W. 615, in which a licensed warehouseman was involved. It is the contention of the petitioner that the holding in the *Kipp* case was never intended to be applied to a licensed warehouseman and that the decision of the Court of Appeals in the instant case is probably in conflict with the local Kansas law, both statutory and judicial. See *Smith* v. *Elevator Co.*, 9 Kan. App. 144, 58 Pac. 483 (1899). The Court of Appeals failed to recognize that the purpose of the Kansas statute is to impose certain requirements and duties upon grain warehousemen doing business in the State, and to impose certain penalties upon such warehousemen if they fail to discharge their duties and responsibilities. It is not the statutory intent to penalize innocent holders for value of warehouse receipts (on the regular statutory forms) for the misconduct of duly *licensed* warehousemen.

3. As to Questions 4 and 5:

While correctly summarizing the facts upon which the petitioner relied for the purpose of tracing its moneys into the grain fund of the bankrupt warehouseman and thus impressing a constructive trust or an equitable lien, the Court of Appeals failed to consider or even to discuss the first-in first-out rule strenuously urged by the peti-

tioner. Immediately prior to the first and second transactions with the petitioner the bankrupt had $435.13 and $115.06, respectively, in its bank account (R. 121-123). On the first occasion, $127,680.00 of the petitioner's money was then deposited in the bankrupt's account, and on the second $65,800.00 was therein deposited (R. 121-123). Immediately after the first transaction with the petitioner, the bankrupt spent $112,786.59 for milo (R. 112, 143-145, 163, 177). Similarly, immediately after the second transaction, the bankrupt spent $92,514.33 for milo (R. 151-153, 167-171, 177). Since in each instance the bankrupt had only nominal sums on deposit in its bank account prior to the deposit of the sight drafts drawn on the petitioner, it must be presumed under the first-in first-out rule that the milo acquired was paid for with the petitioner's money which was the first money deposited after the bankrupt's account had been reduced to the low levels described. In the case of the third transaction the bankrupt had a balance of $15,480.42 in its account before the amount of the last sight draft drawn on the appellant was deposited (R. 131). The amount expended by the bankrupt, however, between December 12 and December 18, 1951, for milo was $89,756.50 which, of course, was substantially more than the said balance (R. 159, 175, 177). The difference under the first-in first-out rule must be presumed to have been paid from the first deposit thereafter made in the bankrupt's account which consisted of the sight draft drawn on the petitioner. The evidence adduced by the petitioner shows that its moneys were used for the purchase of milo which was deposited in the bankrupt's warehouse. If any evidence to the contrary existed, the burden of adducing it rested upon the respondent. That burden was never assumed.

The omission of the Court of Appeals to apply the first-in first-out rule is in conflict with such decisions by other Courts of Appeals as *In Re Bolognesi and Company,* 254 F. 770, 773-774 (CCA 2d 1918), and *Empire State Surety Company* v. *Carroll,* 194 F. 593, 605 (CCA 8th 1912).

Moreover, it is in conflict with decisions of this Court such as *Cunningham* v. *Brown*, 265 U.S. 1, 13, 68 L. Ed. 873, 877, 44 S. Ct. 424, 427 (1923), in which the first-in first-out rule was recognized though not applied.

4. As to Question 6:

The majority opinion of the Court of Appeals states that "no physical deposit of grain was ever intended by the petitioner." It is true that no physical deposit of grain was made by the petitioner itself, and none was intended to be made by the petitioner itself, but the record clearly establishes that the petitioner placed a purchase order for grain, paid for the grain in good faith, and sincerely believed that the grain had been deposited on its behalf by the bankrupt in the bankrupt's warehouses. As the majority opinion now reads, it carries the implication that the petitioner paid out over $260,000.00 of its money for warehouse receipts which it knew to be worthless. This, of course, could not have been the case. *Indeed, it was never so contended by the respondent.*

The majority opinion further states that "the claimant knew that no grain was deposited with the bankrupt for storage and it knew that the receipts did not indicate on their face that they had been registered." There was absolutely nothing before the Court of Appeals to substantiate a finding that the petitioner at any time prior to the adjudication in bankruptcy knew that no grain had been deposited with the bankrupt. Furthermore, no such finding was ever urged by the respondent.

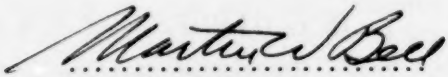
In certain suits now pending in the United States District Court for the District of Kansas the bonding companies which underwrote certain statutory bonds for the bankrupt warehouseman are contending that the said findings now establish the bad faith of the petitioner. Since these findings have no basis in the record, in the conclusions of the Referee in Bankruptcy, or of the District Court, or even in the argument of counsel for the respondent, it is respectfully suggested that the Court of Appeals has so far

departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A

The Opinions, Judgment and Order of the Court of Appeals for the Tenth Circuit

1. The Opinions:

CENTRAL STATES CORPORATION,
Appellant,

vs.

FRANK LUTHER, Trustee,
Appellee.

IN re GARDEN GRAIN & SEED CO., Inc.,
Bankrupt.

No. 4791—May Term, 1954

United States Court of Appeals, Tenth Circuit.

Aug. 13, 1954.

Samuel Morgan, Chicago, Ill. (W. A. Kahrs, Wichita, Kan., with him on the brief), for appellant.

Malcolm Miller, Wichita, Kan., for appellee.

William C. Farmer, U. S. Atty., Wichita, Kan., Warren E. Burger, Asst. Atty. Gen., Melvin Richter and John G. Laughlin, Dept. of Justice, Neil Brooks, Associate Solicitor, Washington, D. C., Giles H. Penstone, Kansas City, Mo., Donald A. Campbell, Washington, D. C., Gerald J. O'Rourke, Dept. of Agriculture, Washington, D. C., on the brief for the United States amicus curiae.

Before Bratton, Huxman and Pickett, Circuit Judges.

BRATTON, Circuit Judge.

This is a controversy arising in a bankruptcy proceeding. Garden Grain and Seed Company, Inc., was a licensed warehouseman under the laws of Kansas, and it operated elevators in that state in which grain was received for storage and transfer. Under date of January 16, 1952, the corporation was adjudged a bankrupt, and a trustee was

seasonably selected. At the time of adjudication, the bankrupt had in its possession 4,320,900 pounds of milo which was later sold under order of the bankruptcy court for $103,995.25. The proceeds of the sale were placed in a special fund, and the controversy revolves around certain claims to the fund.

Central States Corporation, hereinafter referred to as the claimant, filed in the proceeding a reclamation petition and proof of debt. It was alleged in the pleading that on November 14, 1951, the claimant purchased from the bankrupt 100,000 bushels of milo and paid therefor $127,680; that the bankrupt issued an invoice showing the sale; that the milo purchased was immediately stored by the claimant in the warehouse of the bankrupt; that the bankrupt issued twenty negotiable warehouse receipts in the form authorized by the laws of Kansas, each receipt showing ownership in the claimant of 5,000 bushels of milo stored in the warehouse of the bankrupt; that at the direction of the claimant and upon surrender of eight of such warehouse receipts, the bankrupt released to the claimant 33,577 bushels and 38 pounds of milo; and that the bankrupt failed to deliver to the claimant as owner thereof the balance of the stored grain although demand had been made for such delivery. In like terms, it was alleged that on November 29, 1951, the claimant purchased from the bankrupt 50,000 bushels of milo for which it paid $65,800; that an invoice was issued; that the grain was immediately stored by the claimant in the warehouse of the bankrupt; that ten negotiable warehouse receipts were issued, each showing ownership in the claimant of 5,000 bushels of milo stored in the warehouse of the bankrupt; and that although demand had been made therefor, the bankrupt failed to deliver such grain to the claimant. And similarly, it was alleged that on December 15, 1951, the claimant purchased from the bankrupt 50,000 bushels of milo for which it paid $68,880; that an invoice was issued; that the grain was immediately stored by the claimant in the warehouse of the bankrupt; that ten negotiable warehouse receipts were

issued, each showing ownership in the claimant of 5,000 bushels of milo stored in the warehouse of the bankrupt; and that although demand had been made therefor, the bankrupt had failed to deliver such grain to the claimant. It was further alleged that each of such receipts created a trust fund of milo of which the corporation was trustee and the claimant was cestui que trust; that such trust funds were commingled with other trust funds of a similar nature evidenced by warehouse receipts; that the grain owned by the claimant and not delivered by the bankrupt was or should be in the possession of the bankrupt; and that the value of such grain was $219,487.61. Copies of the warehouse receipts were attached to the pleading. Each receipt was designated as negotiable and contained the statement that the bankrupt had received from the claimant a specified number of bushels of milo "in store"; that the bankrupt was "not the owner of the grain covered by this receipt, either solely, jointly, or in common with others"; and that the milo thus deposited by the claimant with the bankrupt "has been graded * * * and may be stored with other grain of the same grade". The prayer of the pleading was that the claimant have judgment for the possession of the milo and funds in the possession of the trustee as thereinbefore alleged; that the court fix and establish claimant's liens against the property of the bankrupt and the property in the possession of the trustee as thereinbefore alleged; and that the claimant be allowed a general claim for the difference, if any, between the value of the milo, cash, liens, and securities received by the claimant and the sum of $219,487.61. The trustee admitted payment of the three sums to the bankrupt; admitted that the claimant did not receive 9,319,650 pounds of milo for which it held warehouse receipts; and denied that the claimant had any lien on any of the assets coming into the hands of the trustee. And by amendment to the answer, the trustee pleaded that the claimant received from the bankrupt 1,880,350 pounds of milo which was not owned by the bankrupt or the claimant, but was owned by persons

who had deposited it with the bankrupt for storage. In addition to answering the petition of the claimant, the trustee filed an action in the nature of an interpleader. The claimant and others were joined as parties. It was alleged among other things in the petition in interpleader that the claimant asserted a claim to the fund but that the trustee did not believe it had any valid rights therein. The prayer was that the court adjudge and decree the owners and respective proportions of ownership of the various claimants to such fund in the hands of the trustee arising from the sale of the milo found among the assets of the bankrupt; and that the court adjudge and decree that the claimant and certain others had no interest in such fund.

After making findings of fact and conclusions of law, the referee entered an order determining that the claimant was not entitled to an equitable lien upon or priority to the special fund in the hands of the trustee; that the claimant should retain as its own property 1,013,159 pounds of milo which it received from the bankrupt; that it should return to the trustee to be placed in the special fund 867,191 pounds of milo, or the value thereof which was fixed at $19,771.95; and that upon the return of the grain or payment of the money, the claim of the claimant would be allowed in the sum of $239,259.56 as a common claim. On petition for review, the district court sustained the order of the referee, and the claimant appealed. For convenience, continued reference will be made to the parties as claimant and trustee, respectively.

The referee concluded that the warehouse receipts held by the claimant were invalid and the district court in effect sustained the conclusion. The claimant challenges that conclusion. It asserts that the receipts are valid. The question must be determined under the laws of Kansas. Interstate Banking & Trust Co. v. Brown, 6 Cir., 235 F. 32, certiorari denied, 242 U.S. 632, 37 S.Ct. 15, 61 L.Ed. 537. Chapter 194, Laws of 1931, section 34-223 et seq., General Statutes of Kansas 1949, relates to the warehousing of grain in public warehouses. The act is elabo-

rate but only part of its provisions have any present material bearing. Authority is contained in the act for the issuance of two kinds of warehouse receipts. Section 34-239 authorizes the issuance of receipts for grain stored in a warehouse licensed under the act and provides the essential contents of such receipts. Section 34-240 authorizes a public warehouseman operating a warehouse to make a valid sale or pledge of warehouse receipts issued for grain of which he is the owner, either solely or jointly or in common with others, and provides that the recital of such ownership in the receipts shall constitute notice to all the world of the right to sell or pledge the same and of the title or specific lien of the transferee or pledgee upon the warehouseman's grain represented by such receipts, provided that such receipts are registered according to the provisions of the act. Section 34-243 defines a non-negotiable receipt. Section 34-244 defines a negotiable receipt. Section 34-246 provides that no warehouse receipt shall be issued except upon actual delivery of grain into the warehouse from which it purports to be issued. Section 34-247 provides for the appointment and qualification of registrars of receipts. Section 34-248 provides that it shall be the duty of every public warehouseman issuing negotiable receipts upon receipt of grain to issue or cause to be issued a receipt therefor in compliance with the act, and to file with the registrar a report showing the amount of grain received, the name of the owner thereof, and the numbers of receipts therefor issued, accompanied by the warehouse receipts for registration. The statute further provides that a public warehouseman must in all cases register every negotiable receipt issued by him for grain of which he is the owner, either solely, jointly, or in common with others. And the statute further provides that upon receipt of such report and warehouse receipts, it shall be the duty of the registrar to register such legal receipts in a book to be kept for that purpose and to stamp on each of them with the official state grain inspection department registration stamp the word "registered"

with the date of registration, and affix his signature thereto. Section 34-290 makes it a criminal offense for a warehouseman, or any officer, agent, or servant of a warehouseman, to issue or aid in the issuance of a warehouse receipt knowing that the grain for which such receipt is issued has not been actually received by such warehouseman, or is not under his actual control at the time of the issuance of such receipt. Section 34-291 makes it a criminal offense for a warehouseman, or any officer, agent, or servant of a warehouseman, fraudulently to issue a receipt for grain, knowing that it contains a false statement. And section 34-298, provides that unless otherwise provided in the act, any person, firm, or corporation, or any officer or agent of any person, firm, or corporation, who shall violate any of the provisions of the act shall be guilty of a misdemeanor. It will be observed with poignant significance that the pertinent language contained in the act in respect to receipts not being issued unless the grain has been actually deposited with the warehouseman and is under his control, as well as the language in respect to receipts issued for grain of which the warehouseman is the owner being registered, is not directory or permissive. Such provisions in the act are unequivocal, mandatory, and imperative. And they represent the considered public policy of the state in respect to the matters falling within their compass. Millers National Insurance Co. v. Bunds, 158 Kan. 662, 149 P. 2d 350, 153 A.L.R. 176.

[1] The claimant did not deliver any grain to the bankrupt for storage. No physical deposit of grain was made and none was ever intended by the parties. The receipts were never registered and the word "registered" was never stamped upon them with the official registration stamp. The claimant knew that no grain was deposited with the bankrupt for storage, and it knew that the receipts did not indicate on their face that they had been registered. The receipts were not conventional bona fide vouchers issued to a depositor of grain. Neither were they receipts

for grain belonging to the bankrupt and then presently stored in its warehouse. It seems clear that the transactions between the claimant and the bankrupt, which included as an integrated part thereof the issuance and delivery of the receipts, did not conform to the statutory exactions of the state in respect to the issuance of warehouse receipts. Our attention has not been called to any case decided by the Supreme Court of Kansas involving the validity of warehouse receipts issued under similar or fairly comparable circumstances to those present here. But in Kipp v. Goffe & Carkener, 144 Kan. 95, 58 P. 2d 102, 108 A.L.R. 918, it was held that one dealing with a warehouseman who had not been licensed under the act was bound to know that the warehouseman had no right, power, or authority as a public warehouseman to receive grain for storage or transfer for the public; and that one storing grain with such a non-licensed warehouseman and taking receipts therefor could not invoke the protection of the act. If one who accepts from a warehouseman not licensed under the act receipts for grain stored in his warehouse cannot invoke the protective provisions of the act, it must follow by appropriate analogy that where one, in disregard of the act, obtains warehouse receipts from a licensed public warehouseman without depositing with such warehouseman any grain for storage and without the receipts being registered in the manner specified in the act cannot be heard to urge with success that the receipts were validly issued under the act and therefore constitute sustainable basis for the assertion in bankruptcy of a right of reclamation, an equitable lien, or preferred claim. First Camden National Bank & Trust Co. v. J. R. Watkins Co., 3 Cir., 122 F. 2d 826.

[2] Another contention advanced is that, having traced the money which it paid to the bankrupt into purchases of milo deposited in the elevators of the bankrupt and there commingled with the common mass of milo which ultimately came into the hands of the trustee, the claimant is

entitled to have such common mass of grain impressed with a constructive trust or equitable lien in its favor, even though no express fiduciary relationship ever existed between the claimant and the bankrupt. It is said in support of the contention that the money which the bankrupt received from the claimant was paid for the specific purpose of purchasing and depositing for the claimant milo in the warehouses of the bankrupt; that in violation of its clear duty, the bankrupt converted, misappropriated, and wrongfully used such money to acquire grain in its own name; and that in such circumstances a constructive trust or equitable lien in favor of the claimant was created and should be recognized. Although no evidence whatever was adduced which tended to show that the claimant paid its money to the bankrupt with the understanding that the bankrupt would use it to purchase grain for the claimant and deposit such grain in the name of the claimant in the elevators belonging to the bankrupt, that fact may be assumed for the moment. Payment of the money to the bankrupt with the understanding that it would be used to purchase grain which would be stored in the name of the claimant in the elevators of the bankrupt, and the wrongful misappropriation of such money to acquire and deposit grain in the name of the bankrupt, standing alone, was not sufficient to vest in the claimant any right to a constructive trust, an equitable lien, or other priority of claim upon the milo which went into the hands of the trustee. It was not enough for the claimant merely to show that its money or the grain purchased therewith went into the assets of the bankrupt. In order for the claimant to be entitled to a constructive trust, an equitable lien, or preferred claim in the proceeds arising from the sale of the milo which reached the hands of the trustee, it was encumbent upon the claimant to show clearly that the milo purchased with the money which the claimant paid to the bankrupt went into the common mass of milo which reached the hands of the trustee and was later sold. Hoffman v. Rauch, 300 U.S. 255, 57 S.Ct. 446, 81 L.Ed. 629; Kershaw

v. Jenkins, 10 Cir., 71 F.2d 647; Johnson v. Morris, 10 Cir., 175 F.2d 65.

[3] The claimant apparently recognizes that, as a prerequisite to the establishment of a constructive trust or an equitable lien, the legal duty rested upon it to trace into the common mass of milo which reached the hands of the trustee milo purchased with money which the claimant paid to the bankrupt. To discharge the burden of proof resting upon it, the claimant relies heavily upon certain facts and circumstances shown upon the trial. At the time of the first transaction between the claimant and the bankrupt, the bankrupt was insolvent; its liabilities on warehouse receipts and storage tickets issued for milo exceeded the amount of milo which it then had in storage; and it had in its bank account a balance of only $435.13. At the time of the second transaction, the bankrupt was insolvent; was short in its milo account; and the balance in its bank account was only $115.06. And at the time of the third and last transaction between the parties, the bankrupt was still insolvent; was still short in its milo account; and the balance in its bank account was $15,480.42. The three sums which the claimant paid to the bankrupt were promptly deposited in the bank account of the bankrupt and they augmented such account by the respective amounts thereof. And immediately after the making of each deposit, the bankrupt spent large sums of money for milo. But continuously from the time the claimant made its first payment to the bankrupt to the filing of the petition in bankruptcy, the bankrupt was actively engaged from day to day in the grain and elevator business. It received grain for storage, shipped grain which had been stored, bought and sold grain on its own account, received money from various sources, paid money for various purposes, and kept its money in a single bank account into which money was deposited and against which checks were drawn. In other words, the bankrupt received and delivered or shipped large quantities of milo and it received

and paid out large sums of money. The money which the claimant paid to the bankrupt was commingled in the bank account with more than $700,000 obtained from other sources and was expended in the conduct of the business. And as we understand the record, throughout the period involved here the bankrupt was short in its inventory position. The record presents a complicated factual situation, but it is fairly apparent that continuously after the first transaction between the claimant and the bankrupt the bankrupt did not have in storage sufficient milo to discharge its obligations under outstanding warehouse receipts, open storage tickets, and other like commitments to its depositors. The claimant failed to show clearly by augmentation or otherwise that the milo or any part thereof which reached the hands of the trustee was purchased with money which the claimant paid to the bankrupt. And in the absence of a clear tracing into the hands of the trustee of milo purchased with the money which the bankrupt received from the claimant, the right to a constructive trust, an equitable lien, or preferred claim upon the $103,995.25 in the special fund in the hands of the trustee was not established.

[4, 5] The question is presented whether the bankruptcy court had jurisdiction to determine in a summary proceeding the controversy in respect to the delivery to the claimant of the 867,191 pounds of milo. A court of bankruptcy does not have jurisdiction to adjudicate in a summary proceeding a controversy respecting property which is held adversely to the bankrupt estate without the consent of the adverse claimant. Unless the adverse claimant consents to the adjudication of the controversy in that manner, resort must be had to a plenary suit. Harrison v. Chamberlin, 271 U.S. 191, 46 S.Ct. 467, 70 L.Ed. 897. The claimant did not challenge the jurisdiction of the bankruptcy court to adjudicate in a summary proceeding the controversy in respect to the grain which it received from the bankrupt. Instead, it litigated the question on its

merits and thus impliedly consented to the adjudication of the controversy in that manner. Accordingly, the order is not fatally infirm for want of jurisdiction of the bankruptcy court to adjudicate in a summary proceeding the controversy in respect to the grain received from the bankrupt.

[6, 7] The turn-over provision in the order of the referee is challenged upon the further ground that the controversy in respect to the return of the 867,191 pounds of grain or payment of the value thereof was one between third parties which did not involve the bankrupt or its property and therefore the bankruptcy court did not have jurisdiction to adjudicate it. It is the general rule that a bankruptcy court is without jurisdiction of a controversy solely and exclusively between third parties which does not involve directly or indirectly the bankrupt or his property. In re Chakos, 7 Cir., 24 F.2d 482; Evarts v. Eloy Gin Corp., 9 Cir., 204 F.2d 712, certiorari denied, 346 U.S. 876, 74 S.Ct. 129. But a court of bankruptcy does have jurisdiction and power to determine a dispute between third parties concerning the ownership of property in which neither the bankrupt nor the trustee has title if it is impossible to administer completely the estate of the bankrupt without determining the controversy. In re Burton Coal Co., 7 Cir., 126 F.2d 447; In re International Power Securities Corp., 3 Cir., 170 F.2d 399. The grain which the bankrupt delivered to the claimant had been in the custody of the bankrupt as bailee. The depositors of such grain are creditors of the bankrupt estate. The claimant is also a creditor. Manifestly, it would be impossible to administer the bankrupt estate completely without determining whether the claimant shall return to the trustee the grain which the bankrupt delivered to it or pay the value thereof because upon the adjudication of that question depends the amount of the claims of the depositors against the bankrupt estate and the source or sources from which such claims shall be paid in whole or in part. And in these

circumstances, the jurisdiction of the bankruptcy court was broad enough to include the adjudication of the controversy as to whether the claimant should return the grain to the trustee or pay the value thereof. In re Burton Coal Co., supra; In re International Power Securities Corp., supra.

[8, 9] One remaining contention urged for reversal of the judgment merits discussion. That contention is that the turnover provision contained in the order of the referee was improperly and illegally included therein. It is said in support of the contention that the milo delivered to the claimant was purchased by the claimant in good faith and paid for in full; that it represented property acquired with the claimant's money; and that it did not constitute a preferential transfer. It is further said that the creditors of the bankrupt have no legal or moral right to the grain purchased with the claimant's money. And it is further said that having traced its money into the commingled fund of milo which came into the hands of the trustee, and having established an equitable lien or constructive trust upon such fund, it must be held that the claimant had the right to enforce its warehouse receipts pro-rata by accepting the delivery of grain made to it. It is the well established rule of law in Kansas and elsewhere that where owners of grain deposit it with a warehouseman for storage with an express or implied understanding that it will be mixed with other grain of like kind and quality, the relationship among the several depositors is that of tenants in common of the commingled mass, the relationship between them and the warehouseman is that of bailors and bailee with the deposited grain being redeemable by grain of similar kind, quality, and quantity, and the right of the warehouseman to sell or make other disposition from the common mass is limited to the excess thereof over and above the quantity necessary to redeem the receipts or other commitments issued to the depositors. Moses v. Teetors, 64 Kan. 149, 67 P.

526, 57 L.R.A. 267; Zuber v. Minshall, 123 Kan. 595, 256 P. 806; Flour Mills of America v. Burrus Mills, 174 Kan. 709, 258 P.2d 341; Kastner v. Andrews, 49 N.D. 1059, 194 N.W. 824; Carson State Bank v. Grant Grain Co., 50 N.D. 558, 197 N.W. 146; Torgerson v. Quinn-Shepherdson Co., 161 Minn. 380, 201 N.W. 615; Hoven v. McCarthy Bros. Co., 163 Minn. 339, 204 N.W. 29. The referee found as a fact that the bankrupt delivered to the claimant milo in the amount of 867,191 pounds when it did not have in the common mass any excess over and above the amount required to discharge its obligations to depositors of milo. Therefore, the delivery to the claimant of that grain amounted to a transfer from the common mass which did not belong to the bankrupt but to the depositors thereof as tenants in common. Of course, the claimant could not be blameworthy for adopting any legal course to save itself from financial loss arising out of its dealings with the bankrupt. But it did not have any warrant in law to enforce pro-rata its rights against the bankrupt by accepting the delivery of grain which belonged to the depositors thereof, not the bankrupt.

[10-12] A bankruptcy court is a court of equity and is guided by equitable principles and doctrines except when they are inconsistent with the Bankruptcy Act, 11 U.S.C.A. § 1 et seq. Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Railway Co., 294 U.S. 648, 676, 55 S.Ct. 595, 79 L.Ed. 1110; Securities and Exchange Commission v. United States Realty & Improvement Co., 310 U.S. 434, 455, 60 S.Ct. 1044, 84 L.Ed. 1293. In passing upon the allowance of claims, a bankruptcy court sits as a court of equity clothed with jurisdiction to sift the circumstances surrounding any claim to see that injustice and unfairness is not done in the administration of the bankrupt estate. Pepper v. Litton, 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281; W. F. Sebel Co. v. Hessee, 10 Cir., 214 F.2d 459. And acting within the framework of the Bankruptcy Act, a court of bankruptcy has power to sub-

ordinate the claim of one creditor to the claims of other creditors where subordination is necessary to prevent the consummation of conduct which is inequitable; has power to attach appropriate conditions to the allowance of a claim; and has power to require a claimant to do equity before receiving equity in the proceeding. Pepper v. Litton, supra; American Surety Co. of New York v. Sampsell, 327 U.S. 269, 66 S.Ct. 571, 90 L.Ed. 663; Heiser v. Woodruff, 327 U.S. 726, 66 S.Ct. 853, 90 L.Ed. 970; In re Erickson, 7 Cir., 106 F.2d 937; In re Commonwealth Light & Power Co., 7 Cir., 141 F.2d 734; In re Kansas City Journal-Post Co., 8 Cir., 144 F.2d 791; In re V. Loewer's Gambrinus Brewery Co., 2 Cir., 167 F.2d 318. Having received from the bankrupt 867,191 pounds of milo which did not belong to the bankrupt but to the depositors thereof, it would be a devastating impingement upon plain principles of equity to permit the claimant to retain unto itself such grain or the value thereof and at the same time share ratably with such depositors and other creditors in the distribution of the assets of the bankrupt estate. The order requiring the claimant to return the grain referred to or pay the value thereof, and conditioning the allowance of the claim of the claimant as a common claim upon the return of such grain or payment of the value thereof, was well within the discretion of the bankruptcy court.

The judgment is Affirmed.

PICKETT, Circuit Judge (dissenting in part).

I concur in the majority opinion except that part which upholds the so-called "turnover order". This order conditions the allowance of the Central States' claim as a common creditor upon its delivery to the trustee of 867,191 pounds of milo, or its value, fixed at $19,771.95.

The referee found that this amount of grain did not belong to the bankrupt, but was the property of those who had deposited it in the bankrupt's elevator. Concededly, this grain could not become an asset of the bankrupt estate. When received, the trustee will deliver it, or its

value, to the depositors. It will not in the slightest degree affect the assets of the bankrupt. It is true that a determination of the title to the grain may affect the amount of the claim of the depositors or Central States, but it will not affect the bankruptcy estate. So long as Central States retains the grain, its claim will be reduced and the claim of the depositors will be increased in the amount of the value of the grain. If the grain was wrongfully delivered, the depositors could proceed directly against Central States to recover the grain, or the amount which they have been damaged, and I think it is a matter to be settled between the claimants outside the bankruptcy court. If this type of a proceeding, as it related to this particular grain, is sanctioned, it will permit the use of the broad powers of the bankruptcy court to be used in a summary manner to adjudicate claims to property in which the trustee has no interest and will result in no benefit to the bankrupt estate.

It is recognized that the bankruptcy court does not have jurisdiction over controversies exclusively between third parties which do not involve the bankrupt or his property. Evarts v. Eloy Gin Corp., 9 Cir., 204 F.2d 712, certiorari denied 346 U.S. 876, 74 S.Ct. 129; In re Lubliner & Trinz Theatres, 7 Cir., 100 F.2d 646; Smith v. Chase Nat. Bank of City of New York, 8 Cir., 84 F.2d 608. It is said that the bankruptcy court does, however, have jurisdiction and power to determine disputes between third parties concerning the ownership of property which does not belong to the estate, if it is impossible to completely administer the bankrupt estate without determining that dispute. In re Burton Coal Co., 7 Cir., 126 F.2d 447, and In re International Power Securities Corp., 3 Cir., 170 F.2d 399, 405, are cited as authority for these statements. The proceedings in these cases were for reorganization. In the Burton Case there was a dispute as to the ownership of stock in the bankrupt corporation which was seeking a reorganization. The court there said that the reorganization could not proceed without a settlement of that dis-

pute. In the International Power Case, the question of jurisdiction arose over the right to enjoin or dispose of bonds of the corporation which was seeking reorganization. In upholding its jurisdiction, the court stated that the "reorganization could not be formulated prior to the resolution of the questions of ownership of the bonds and the asserted equitable rights." The facts in those cases clearly distinguish them from this case. I have found no case which has upheld the jurisdiction of the bankruptcy court in an ordinary bankruptcy proceeding to enter a turnover order with respect to property which was not claimed as the property of the bankrupt estate. Collier on Bankruptcy, 14th Ed., Sec. 23.10. I would hold that the bankruptcy court does not have jurisdiction to determine the depositors' title to grain which had been delivered to a purchaser prior to bankruptcy. It appears to me that the trustee is assuming the burdens and expense of the grain depositors in this matter.

In determining the amount of grain which Central States was required to account for and turn over, the referee allowed Central States to retain only the overage which the bankrupt owned at the date the purchase was made. The purchaser of grain from a warehouseman who receives delivery at a time when the warehouseman has a shortage is as a general rule, liable to the depositors of grain for the amount in excess of his pro rata share. 56 Am. Jur. Warehouses Sec. 208. But, if subsequent to the excessive delivery the warehouseman substitutes other grain therefor and places it in the commingled mass, then the title to the substituted grain is vested in the depositors and holders of the warehouseman's receipts. State ex rel. Hermann v. Farmers Elevator Co., 59 N.D. 679, 231 N.W. 725, 727; Carson State Bank v. Grant Grain Co., 50 N.D. 558, 197 N.W. 146; Kastner v. Andrews, 49 N.D. 1059, 194 N.W. 824, 827-829; Hall v. Pillsbury, 43 Minn. 33, 44 N.W. 673, 7 L.R.A. 529; National Exchange Bank v. Wilder, 34 Minn. 149, 24 N.W. 699. The evidence does not disclose, and the referee made no finding, as to the condition of the

bankrupt's grain account after delivery to Central States was made. Consequently, I am of the view that the turnover order was based upon improper criteria and cannot stand.

2. Judgment:

Forty-fifth Day, May Term, Friday, August 13th, 1954. Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable John C. Pickett, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said district court in this cause be and the same is hereby affirmed.

3. Order: Petition for Rehearing Denied.

Fifty-ninth Day, May Term, Tuesday, September 7th, 1954. Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable John C. Pickett, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition is hereby denied.

APPENDIX B

"It shall be the duty of each and every public warehouseman issuing negotiable receipts upon receipt of any grain, to issue or cause to be issued a receipt therefor, in compliance with this act, and to by twelve o'clock the following business day, or such time that the inspector shall designate, file with the registrar of warehouse receipts designated by the chief inspector, a report as hereinafter provided, and showing the amount of grain received, the name of the owner thereof, and the numbers of receipts therefor issued, accompanied by the warehouse receipts for registration: Provided, That at the option of the chief inspector, a public warehouseman may issue unregistered negotiable receipts for grain of which the warehouseman is not the owner, either solely, jointly, or in common with others: And provided further, That a public warehouseman must, in all cases, register every negotiable receipt issued by him for grain of which the warehouseman is the owner, either solely, jointly, or in common with others. And it shall be unlawful for any grain warehouseman to limit or modify his responsibility imposed by law by any words inserted in any such receipt or by any contract relative thereto. Upon receipt of such report, as hereinafter provided, and warehouse receipts, it shall be the duty of the registrar of warehouse receipts to register such legal receipts in a book to be kept for that purpose and to stamp on each of such receipts with the official state grain inspection department registration stamp the word 'registered' with the date of registration and affix his signature thereto." Kansas G.S. 34-248 (1949).

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1954

CENTRAL-STATES CORPORATION, *Petitioner,*

v.

FRANK LUTHER, Trustee of the Estate of Garden Grain and Seed Company, Inc., Bankrupt

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Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 5th, 1955.

/s/ TOM C. CLARK
Associate Justice of the Supreme Court of the United States.

Dated this 6th
day of December, 1954

3/14

FILED
FEB 3 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 514

CENTRAL STATES CORPORATION, PETITIONER,

vs.

FRANK LUTHER, TRUSTEE OF THE ESTATE OF GARDEN GRAIN AND SEED COMPANY, INC., BANKRUPT, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

Opinions Below 1
Jurisdiction 2
Questions Presented 2
I 2
II 2
III 3
IV 3
V 3
VI 3
Statutes Involved 3
Statement 4
Argument 8
I 9
II 13
III 16
IV 17
V 19
VI 20
Conclusion 22
Appendix 23

CASES

Alexander v. *Hillman*, 296 U. S. 222, 80 L. Ed. 192 ..10, 11, 12
American Service Co. v. *Henderson*, 120 F. 2d 525 (C. A. 4) 20
American Surety Co. v. *Sampsell*, 327 U. S. 269, 90 L. Ed. 663 15

Banco Kentucky Co.'s Receiver v. *National Bank*, 281 Ky. 784, 137 S. W. 2d 357 11
Bank v. *Elevator Co.*, 9 Kan. App. 144, 58 Pac. 483 17
Barnes v. *Patrick*, 176 Wash. 142, 28 P. 2d 293, 91 A. L. R. 901 ..... 9, 14
Beeching v. *Beeching*, 135 Kan. 242, 10 P. 2d 7 15
Bradford v. *Chase National Bank*, 24 Fed. Supp. 28 (S. D. N. Y.), affirmed 105 F. 2d 1001 (C. A. 2), affirmed 309 U. S. 632, 84 L. Ed. 990 18
Brown Memorial Foundation v. *Rohrer*, 152 Kan. 291, 103 P. 2d 814 17
Carson State Bank v. *Grant Grain Co.*, 197 N. W. 146, 50 N. D. 558 14
Case v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 84 L. Ed. 110 11
Century Ins. Co. v. *First Nat. Bank*, 102 F. 2d 726 (C. A. 5) 9, 11
Chase National Bank v. *Lyford*, 147 F. 2d 273 (C. A. 2) 11-12
Columbia Foundry v. *Lochner*, 179 F. 2d 630 (C. A. 4) 12
Conway v. *Union Bank of Switzerland*, 204 F. 2d 603 (C. A. 2) 12
Cunningham v. *Brown*, 265 U. S. 1, 68 L. Ed. 873 18
DeLaney v. *City and County of Denver*, 185 F. 2d 246 (C. A. 10) 9
Dows v. *National Exchange Bank of Milwaukee*, 91 U. S. 618, 23 L. Ed. 214 14
Farmers Grain Co. v. *A., T. & S. F. Ry. Co.*, 121 Kan. 10; 120 Kan. 21, 245 Pac. 734 14
Fidelity-Philadelphia Trust Co. v. *Hale & Kilburn Corp.*, 24 Fed. Supp. 3 (E. D. Pa.) 11
Fireman's Ins. Co. of Newark v. *Smith*, 180 F. 2d 371 (C. A. 8) 11
First Camden National Bank & Trust Co. v. *J. R. Watkins Co.* 122 F. 2d 826 (C. A. 3) 15
Florance v. *Kresge*, 93 F. 2d 784 (C. A. 4) 12
Floro Realty & Inv. Co. v. *Steem Elec. Corp.*, 128 F. 2d 338 (C. A. 8) 12

Flour Mills of America v. *Burrus Mills*, 174 Kan. 709, 258 P. 2d 341 ..... 14, 15
Gardner v. *New Jersey*, 329 U. S. 565, 91 L. Ed. 504 13
Giffin v. *Vought*, 175 F. 2d 186 (C. A. 2) 12
Graham v. *Frazier*, 60 S. E. 2d 833, 82 Ga. App. 185 affirmed 66 S. E. 2d 77, 84 Ga. App. 458 14-15
Gramil Weaving Corp. v. *Raindeer Fabrics*, 185 F. 2d 537 (C. A. 2) 12
Great Atlantic & Pacific Tea Co. v. *Citizens Nat. Bank*, 66 F. 2d 883 (C. A. 3) 20
Green v. *Fortune*, 151 Kan. 598, 100 P. 2d 631 17
Hall v. *Pillsbury*, 44 N. W. 673, 43 Minn. 33 14
Harris v. *Avery Brundage Co.*, 305 U. S. 160, 83 L. Ed. 100 9
Heiser v. *Woodruff*, 327 U. S. 726, 90 L. Ed. 970 15
Hoven v. *McCarthy Bros. Co.*, 204 N. W. 29, 163 Minn. 339 14
In re Bowling Green Milling Co., 132 F. 2d 279 (C. A. 6) 14
In re Burton Coal Co., 126 F. 2d 447 (C. A. 7) 10
In re Gillespie Tire Co., 54 Fed. Supp. 336 (W. D. So. Car.) 12
In re Gubelman, 9 F. 2d 486 (C. A. 2) 19
In re Harbor Stores Corp., 29 Fed. Supp. 749 (S. D. N. Y.) 15
In re House of Gus Holder, Inc., 91 Fed. Supp. 841 (D. N. J.) 12
In re International Power Securities Corp., 170 F. 2d 399 (C. A. 3) 10
In re Larkin & Metcalf, 202 Fed. 572 (D. So. Dak.) 20
In re Mercury Engineering Co., 60 Fed. Supp. 786 (S. D. Calif.) 12
In re Morris Bros., Inc., 282 Fed. 670 (D. Ore.), af-
In re Nathan, 98 Fed. Supp. 686 (S. D. Calif.) 12
In re Pacat Finance Corp., 27 F. 2d 810 (C. A. 2) 20
In re Petroleum Conversion Corp., 196 F. 2d 728 (C. A. 3) 12

In re Poston Const. Corp., 115 Fed. Supp. 323 (N. D. Ohio) 12
In re Quandt Brewing Co., 44 Fed. Supp. 750 (N. D. N. Y.) 9
In re Seaboard Engineering Co., 292 Fed. 106 (C. A. 4) 19
In re Seminola Macaroni Co., 109 Fed. Supp. 453 (D. R. I.) 12
In re Solar Mfg. Co., 200 F. 2d 327 (C. A. 3) 12
In re Superior Motor Truck Co., 275 Fed. 623 (N. D. Ga.) 19
In re Walter J. Schmidt & Co., 298 Fed. 314 (S. D. N. Y.) 18
In re Whitehall Stores, 196 F. 2d 667 (C. A. 7) 20
Jackson v. *Sevatson*, 82 N. W. 634, 79 Minn. 275 14
Kastner v. *Andrews*, 194 N. W. 824, 49 N. D. 1059 14
Kipp v. *Goffe & Carkener*, 144 Kan. 95, 58 P. 2d 102 17
Leslie v. *Milling Co.*, 109 Kan. 146, 197 Pac. 1094 14
Lowden v. *Northwestern National Bank & Trust Co.*, 84 F. 2d 847 (C. A. 8) 18
McComb v. *Frank Scerbo & Sons*, 177 F. 2d 137 (C. A. 2) 11
McDonnell v. *Bank of China*, 33 F. 2d 816 (C. A. 9) 15
McKey v. *Paradise*, 299 U. S. 119, 81 L. Ed. 75 20
Milliorn v. *Clow*, 70 Pac. 398, 42 Ore. 169 14
Mitchell v. *Munn Whs. Co.*, 86 P. 2d 174, 59 Idaho 661 15
Moses v. *Teetors*, 64 Kan. 149, 67 Pac. 526 14
National Labor Relations Board v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 95 L. Ed. 479 8
Nieter v. *McCaull-Dinsmore Co.*, 199 N. W. 85, 159 Minn. 395 14
Pepper v. *Litton*, 308 U. S. 295, 84 L. Ed. 281 15
Pittman v. *Union Planters Nat. Bank & Trust Co.*, 118 F. 2d 211 (C. A. 6) 20
Porter v. *Warner Holding Co.*, 328 U. S. 395, 90 L. Ed. 1332 11
Queenan v. *Mayes*, 90 F. 2d 525 (C. A. 10) 20

Railroad Credit Corp. v. *Hawkins*, 80 F. 2d 818 (C. A. 4) 11
Rossman v. *Blunt*, 104 F. 2d 877 (C. A. 6) 20
Scott v. *Bankers Union*, 73 Kan. 575, 85 Pac. 604 17
Sexton-Abbott v. *Graham*, 4 N. W. 1090, 53 Iowa 181 15
Shugar v. *Antrim*, 177 Kan. 70, 276 P. 2d 372 17
Solomon v. *Boschulte*, 200 F. 2d 482 (C. A. 3) 20
State v. *Broadwater Elevator Co.*, 201 Pac. 687, 61 Mont. 215 15
State v. *Farmers Coop. Elevator Co.*, 167 N. W. 223, 39 N. D. 235 15
State v. *Inter-State Surety Co.*, 189 N. W. 679, 45 S. D. 592 15
State v. *Oakley*, 225 Pac. 425, 129 Wash. 553 15
State v. *Robb-Lawrence Co.*, 115 N. W. 846, 17 N. D. 257 15
St. Louis & S. F. R. Co. v. *Spiller*, 274 U. S. 304, 71 L. Ed. 1060 19
firmed 293 Fed. 294 (C. A. 9) 19-20
Stutsman v. *Cook*, 204 N. W. 976, 53 N. D. 162 15
Switow v. *Sher*, 186 So. 519, 136 Fla. 284 11
Taylor v. *Producers Pipe & Supply Co.*, 114 F. 2d 785 (C. A. 10) 11
Torgerson v. *Quinn-Shepherdson Co.*, 201 N. W. 615, 161 Minn. 380 14
United States v. *City of Jacksonville*, 167 F. 2d 366 (C. A. 5) 14
Wheat Growers Association v. *Rowan*, 125 Kan. 710, 266 Pac. 101 17
Whitney v. *Wenman*, 140 Fed. 959 (S. D. N. Y.) 15
W. S. Brown Merc. Co. v. *Yielding Bros. Dept. Store*, 76 So. 4, 200 Ala. 412 14
Zuber v. *Minshall*, 123 Kan. 595, 256 Pac. 806 14

MISCELLANEOUS

56 Am. Jur.—

Par. 28, p. 334 ____ 14
Par. 37, p. 339 ____ 15
Par. 167, p. 397 ____ 14, 15
Par. 168, p. 398 ____ 14
Par. 206, p. 415 ____ 14

67 C. J.—

23, p. 456 ____ 14
24, p. 457 ____ 14
172, p. 538 ____ 15
173, p. 539 ____ 15

STATUTES

General Statutes of Kansas 1949—

34-238 ____ 3, 16, 23
34-239 ____ 3, 16, 23
34-240 ____ 3, 16, 24
34-246 ____ 3, 16, 25
34-247 ____ 3, 16, 26
34-248 ____ 3, 16, 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 514

CENTRAL STATES CORPORATION, PETITIONER,

VS.

FRANK LUTHER, TRUSTEE OF THE ESTATE OF GARDEN GRAIN AND SEED COMPANY, INC., BANKRUPT, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Central States Corporation has filed a petition praying that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the

Tenth Circuit. Such judgment of affirmance was entered on August 13, 1954, and a petition for rehearing denied September 7, 1954. The opinion of the Court of Appeals is reported in 215 F. 2d 38.

The controversy originated in Bankruptcy in the United States District Court for the District of Kansas and the first decision was made by the Honorable E. R. Sloan, Referee in Bankruptcy. Such opinion is unreported but is contained in the record at pages 10 through 23. A petition for review of the Referee's order was made to the Honorable Delmas C. Hill, Judge of the United States District Court for the District of Kansas. Such court did not write an opinion but entered an order sustaining in all respects the findings of fact, memorandum opinion and conclusions of law of the Referee. Such order is contained in the record at pages 23 and 24.

JURISDICTION

The jurisdictional requisites are set forth in the petition.

QUESTIONS PRESENTED

I

Whether the Bankruptcy Court had jurisdiction to require an accounting from Petitioner for Milo wrongfully taken from the Bankrupt's inventory when Petitioner and many others filed claims to such Milo inventory which was in the custody of the Court.

II

Assuming jurisdiction, whether the Courts below properly rendered an accounting using correct criteria in

requiring Central States Corporation, as a condition to the allowance of its claim as a common claim against the general assets of the Bankrupt, to account for 867,191 lbs. of Milo to the Milo inventory.

III

Whether the Courts below properly held that the warehouse receipts purchased by the Petitioner, Central States Corporation, from the bankrupt warehouseman were void, invalid and unenforceable under the applicable statutes of the State of Kansas.

IV

Whether the Bankruptcy Court was required to apply the first in first out rule to monies deposited in the bankrupt warehouseman's bank account for tracing purposes.

V

Whether the Petitioner, Central States Corporation, established a constructive trust or equitable lien on any funds traced into the hands of the Trustee of the bankrupt warehouseman.

VI

Whether the Court of Appeals included erroneous conclusions in its opinion and thereby departed from the accepted and usual course of judicial proceedings.

STATUTES INVOLVED

The pertinent statutory provisions of the General Statutes of Kansas dealing with warehouses and the issuance of warehouse receipts are G. S. 1949, 34-238, 34-239, 34-240, 34-246, 34-247, 34-248. All such pertinent statutory provisions are printed in the appendix herein, beginning on page 23.

STATEMENT

The Garden Grain & Seed Co., Inc., was a licensed warehouseman under the laws of the State of Kansas. A creditors' petition was filed on January 16, 1952, and an order of adjudication was entered on January 18, 1952, and the case referred to the Referee in Bankruptcy. (R. 12). At bankruptcy the bankrupt had in its possession in storage 4,320,900 lbs. of Milo which was sold under order of the Court and the proceeds held by the Trustee in a special fund. (R. 12, 51). The bankrupt was incorporated under the laws of Kansas on June 28, 1949. It commenced business with $10,000.00. Its stock was issued in return for assets valued at $83,719.32. Only $25,000.00 thereof was represented by the stock, the remainder, $58,719.32, being reported on the annual report to the Secretary of the State of Kansas as "Paid in Surplus". (R. 186-190). The corporation consistently lost money. (R. 193). It was short in its grain position in a rising market. (R. 209).

Petitioner on July 14, 1952, filed a reclamation petition and proof of debt alleging that it purchased in 1951 on November 14, November 29 and December 15, 100,000 bushels, 50,000 bushels, and 50,000 bushels, respectively, of Milo from the bankrupt which was immediately stored in the warehouses of the bankrupt and 20, 10 and 10 warehouse receipts, respectively, were issued to Petitioner by the bankrupt. (All such warehouse receipts were on the same form. One is pictured in the record at page 37). A part of such receipts were surrendered to the bankrupt and shipments of Milo were made to Petitioner totaling 1,880,350 lbs., leaving a total amount of Milo allegedly owned by Petitioner of 166,422 bushels and 18 lbs. It was alleged that such warehouse receipts created a trust fund of Milo and that, using the first in first out rule, Petitioner

had the first right to the Milo on deposit in the bankrupt's warehouses at the time the petition in bankruptcy was filed. Petitioner also alleged that the monies it paid to the bankrupt as a result of the transactions of November 14, November 29 and December 15 constituted a trust fund and that it had a first and prior lien on any monies obtained by the bankrupt through the sale of Milo and on any property purchased with the funds so paid to the bankrupt. (R. 27-34).

The Respondent answered admitting the payments made by Petitioner and admitting further that the Petitioner held warehouse receipts purporting to represent 9,319,650 lbs. of Milo but denied that such receipts represented any grain or that Petitioner had any lien on any of the properties coming into the hands of the Respondent as receiver and later Trustee. (R. 46). An amendment to such answer was filed alleging that the 1,880,350 lbs. of Milo delivered to the Petitioner did not belong to Petitioner but belonged to individuals who made bailment contracts with the bankrupt warehouseman. A demand was made for an accounting for such delivered Milo. (R. 47, 48).

The Respondent also filed an action in the nature of interpleader setting forth that he obtained possession of the bankrupt's Milo inventory of 4,320,900 lbs. which was sold under order of the Court and the proceeds retained by him in a special fund and made parties thereto all persons who made claim to such Milo inventory. Such pleading disclosed that nearly 100 individuals made claim to such fund and that the total of such claims was over thirty-four million pounds. Respondent set forth therein the facts as he had been able to reconstruct them as to all the claims filed alleging ownership of Milo and prayed that the Court adjudge, declare and decree the owners and respective por-

tions of ownership of the various claimants to the Milo inventory. (R. 51-62).

The Referee in Bankruptcy entered an order denying that the Petitioner was entitled to an equitable lien or constructive trust on any property but was entitled only to be recognized as a common claimant. The Referee found also that the Petitioner had obtained 867,191 lbs. of Milo to which it was not entitled and which belonged to those individuals who successfully made claim to the Milo inventory of the bankrupt. The Referee conditioned the allowance of Petitioner's claim as a common claim on the return of such 867,191 lbs. of Milo. (R. 10-23). The United States District Court for the District of Kansas affirmed on petition for review. (R. 23, 24). The Court of Appeals for the Tenth Circuit affirmed on appeal, 215 F. 2d 38.

The first transaction between the Petitioner and the bankrupt with which we are here concerned was on November 14, 1951, when the bankrupt sold Petitioner its warehouse receipts numbers 128 through 147, each for 5,000 bushels, making a total of 100,000 bushels. (R. 181). The bankrupt drew a sight draft on the Petitioner which it deposited in the Garden National Bank for immediate credit. (R. 68, 69, 118, 121). Such draft was paid by Petitioner by its check dated November 19, 1951. (R. 118).

On November 29, 1951, the Petitioner purchased 10 warehouse receipts from the bankrupt, being numbers 164 through 173, for 5,000 bushels each of Milo, or a total of 50,000 bushels. (R. 183). The bankrupt drew a sight draft on Petitioner which it deposited in the Garden National Bank for immediate credit. (R. 72, 119, 123). This sight draft was paid by Petitioner by its check dated December 3, 1951. (R. 119).

On December 15, 1951, Petitioner purchased 10 warehouse receipts from the bankrupt, being numbers 179

through 188, each for 5,000 bushels of Milo, or a total of 50,000 bushels. (R. 184). The bankrupt again drew a sight draft on petitioner and deposited it in the Garden National Bank for immediate credit. (R. 120, 131). Such sight draft was paid by Petitioner by its check dated December 17, 1951. (R. 120).

All such warehouse receipts sold by the bankrupt and purchased by the Petitioner in the three transactions were on the Kansas State form to be used for producer-depositors and recited that there was deposited in store by the Central States Corporation, Petitioner herein, a quantity of Milo which was not owned, in whole or in part, by the warehouseman (R. 37, 39, 115, 117). The Petitioner deposited no Milo whatever with the bankrupt at any time. (R. 200, Schedule 16 of Audit Report, R. 211 through 249). The same Schedule 16 discloses that the warehouseman was many million pounds short in its Milo position from and after November 14. After November 14 and before the petition in bankruptcy was filed, the bankrupt obtained $777,182.78 (in addition to the $262,360 it obtained from the Garden National Bank for the sight drafts drawn on the petitioner) which it used to purchase Milo and to operate its business and which was exhausted except for $1,224.85 by the end of December, 1951. (R. 121-123, 131-133). Milo was purchased during this period, including approximately five and one half million pounds which had been deposited in the bankrupt's warehouses prior to November 14. Thus the accounts payable for Milo purchased was reduced from over eight and one-half million pounds (R. 247) to 3,304,037 lbs. (R. 249). The bankrupt purchased approximately twenty-one and one-half million pounds of Milo in addition to such reduction in accounts payable for Milo during the same period. (R. 143-179, 209). During the same period it made sales of Milo (excluding

any amount to the Petitioner, Central States Corporation) totaling nearly twenty-five million pounds. (R. 209, 247-249).

The Milo inventory of the bankrupt on November 13, just before the first transaction with Petitioner, taking shrink into consideration (R. 203) was 20,143,856 lbs. It had liability to depositors for open storage and warehouse receipts of 7,337,422 lbs. and 1,589,959 lbs., respectively. (R. 247).

On the same basis at the time the petition in bankruptcy was filed, the inventory of Milo was 4,976,230 lbs. and the liability to depositors for open storage and warehouse receipts was 3,379,371 lbs. and 2,742,147 lbs. (R. 249).

ARGUMENT

There are no issues involved herein warranting review by this Court on certiorari. From Rule 19 of the revised rules of the Supreme Court of the United States and this Court's statements in *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 340 U. S. 498, 502, 95 L. Ed. 479, 482, the granting of certiorari is limited to cases involving principles that are of importance to the public generally and in cases where there is a basic conflict of opinion and authority between the Courts of Appeal. This Court is, of course, greatly interested in insuring that the lower Federal Courts make a fair assessment of the case but obviously can not grant certiorari because on a consideration of the entire record, a different decision might be reached. The Petitioner endeavors at this late date and for the first time by attacking jurisdiction to bolster a petition which otherwise quite obviously is not material for this Court and deals only with the correctness of the de-

cisions rendered below. There is no conflict of decision on the jurisdictional question posed by the Petitioner and the decisions thereon below are manifestly correct. The correctness of the decisions below on the remaining questions is equally clear. We will, however, present herein a brief argument on each question raised.

I

Petitioner asserts that the trial court did not have jurisdiction of the subject matter so as to enable it to order an accounting under which as a condition to the allowance of its claim, the Central States Corporation had to return to the special fund resulting from the liquidation of the Milo inventory 867,191 lbs. of Milo or the value thereof. Jurisdiction is, of course, composed of two elements—jurisdiction of the subject matter and jurisdiction of the person. There is no question raised concerning the custody of the Court below over the Milo inventory of 4,320,900 lbs. or the special fund resulting from the liquidation of such inventory. (R. 51). This fund was the subject matter of the controversy insofar as the accounting to the Milo inventory is concerned. There can be no question but what the Court had jurisdiction of this *res* since it had custody of such fund. See *Harris* v. *Avery Brundage Co.*, 305 U. S. 160, 83 L. Ed. 100; *DeLaney* v. *City and County of Denver*, 185 F. 2d 246 (C. A. 10); *Century Insurance Co.* v. *First National Bank*, 102 F. 2d 726 (C. A. 5); *In re Quandt Brewing Co.*, 44 Fed. Supp. 750 (N. D. N. Y.); *Barnes* v. *Patrick*, 176 Wash. 142, 28 P. 2d 293, 91 A. L. R. 901.

Approximately 100 individuals claimed the Milo inventory of the bankrupt and their claims totaled over thirty-four million pounds. Clearly these claims had to be adjudicated by the trial court in order to determine which ones were valid against the Milo inventory and in what

quantities as a condition precedent to the determination of which claims were valid against the general assets of the bankrupt and in what quantity. See the opinion below, 215 F. 2d 38, 45; and see *In re Burton Coal Co.*, 126 F. 2d 447 (C. A. 7); *In re International Power Securities Corp.*, 170 F. 2d 399 (C. A. 3). In order to accomplish the first step and to determine the rights of the many claimants to the Milo inventory, Respondent filed an action in the nature of interpleader (R. 51-62).

Obviously the Court had jurisdiction since it had custody of the fund and had before it the many claimants to such fund resulting from liquidation of the Milo inventory. The only jurisdictional question which could arise under these circumstances concerns whether the trial court could require an accounting from one of such claimants for a portion of the Milo inventory withdrawn from the bankrupt's warehouses. Certainly the Court having jurisdiction of the subject matter (the fund) and of the person (the claimants) had jurisdiction in respect of all defenses that might be made to any of the claims. The general rule of equity jurisprudence is that the court will decide all matters in dispute and decree complete relief. Equity does not work by halves. In the broad sense the subject matter embraces not only the fund in the custody of the court but any properties wrongfully withheld from such fund. This Court has decided the identical question in *Alexander* v. *Hillman*, 296 U. S. 222, 80 L. Ed. 192. In such case the Court had custody of a fund and had before it a receiver and many claimants to such fund. A question arose concerning whether one of such claimants wrongfully withheld property that in equity belonged in the fund. This Court determined that it was proper for the trial court to hear all defenses, all cross-claims and counter-claims and to decree complete relief including affirmative relief.

The court below did exactly what this Court determined it should do. It had custody of a fund and had before it many claimants to such fund. There arose a question concerning whether one of the claimants wrongfully withheld from such fund by virtue of obtaining a part of the Milo inventory before the Respondent took over the custody of the Milo inventory on the day of adjudication. It proceeded to decide all matters in controversy and decree complete relief. The fact that the trial court below was also a court of bankruptcy has, we submit, no bearing on the identity of the issues here appearing and those before this Court in *Alexander* v. *Hillman, supra.**

Alexander v. *Hillman, supra,* is followed by appropriate analogy in cases dealing with the bankruptcy court's jurisdiction under the Bankruptcy Act where a controversy arises over distribution of the general assets of the bankrupt and where questions arise concerning defenses to claims because of the act of a claimant in wrongfully withholding from such general assets. Thus the Court of Appeals for the Second Circuit through a series of cases beginning with *Chase National Bank* v. *Lyford,* 147

**Alexander* v. *Hillman, supra,* has been followed many times and by the Court of Appeals, 10th Circuit. *Taylor* v. *Producers Pipe & Supply Co.,* 114 F. 2d 785 (C. A. 10); *Porter* v. *Warner Holding Co.,* 328 U. S. 395, 399, 90 L. Ed. 1332, 1338; *Case* v. *Los Angeles Lumber Products Co.,* 308 U. S. 106, 126, 84 L. Ed. 110, 126; *Fireman's Ins. Co. of Newark* v. *Smith,* 180 F. 2d 371 (C. A. 8); *McComb* v. *Frank Scerbo & Sons,* 177 F. 2d 137, 138 (C. A. 2); *Century Ins. Co.* v. *First National Bank,* 102 F. 2d 726 (C. A. 5); *Banco Kentucky Co.'s Receiver* v. *National Bank,* 281 Ky. 784, 137 S. W. 2d 357, 370; *Switow* v. *Sher,* 186 So. 519, 524, 136 Fla. 284; *Railroad Credit Corp.* v. *Hawkins,* 80 F. 2d 818, 822 (C. A. 4); *Fidelity-Philadelphia Trust Co.* v. *Hale & Kilburn Corp.,* 24 Fed. Supp. 3, 13 (E. D. Pa.).

F. 2d 273 (C. A. 2), through *Giffin* v. *Vought*, 175 F. 2d 186, particularly at note page 190 (C. A. 2), and continuing in *Gramil Weaving Corp.* v. *Raindeer Fabrics*, 185 F. 2d 537 (C. A. 2), and concluding in *Conway* v. *Union Bank of Switzerland*, 204 F. 2d 603 (C. A. 2), has held that a claimant to the general assets of a bankrupt who files a claim in the bankruptcy proceedings exposes himself to every defense that may be made to his claim, including set-offs and counter-claims, and since *Alexander* v. *Hillman, supra*, the bankruptcy court may not only adjudicate summarily all defenses, but it may decree complete relief and grant an affirmative judgment in favor of the Trustee.

The Court of Appeals for the Fourth Circuit is in accord. See *Florance* v. *Kresge*, 93 F. 2d 784 (C. A. 4); *Columbia Foundry* v. *Lochner*, 179 F. 2d 630 (C. A. 4); as are the Eighth Circuit, *Floro Realty & Inv. Co.* v. *Steem Elec. Corp.*, 128 F. 2d 338 (C. A. 8); and the Third Circuit, *In re Solar Mfg. Co.*, 200 F. 2d 327 (C. A. 3); *In re Petroleum Conversion Corp.*, 196 F. 2d 728 (C. A. 3).*

The basic legal principles underlying these cases are the same, we submit, which prompted this Court to reach its decision in *Alexander* v. *Hillman*, 296 U. S. 222, 80 L. Ed. 192. A claimant who petitions for part of the general assets, the *res*, can not complain of the Court's action in determining whether such claimant wrongfully withholds from the *res* not only as a defense to the claim but also as to an affirmative judgment. Such decisions

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*There are many other cases in accord. *In re Poston Const. Corp.*, 115 Fed. Supp. 323 (N. D. Ohio); *In re Nathan*, 98 Fed. Supp. 686 (S. D. Calif.); *In re House of Gus Holder, Inc.*, 91 Fed. Supp. 841 (D. N. J.); *In re Mercury Engineering Co.*, 60 Fed. Supp. 786 (S. D. Calif.); *In re Seminola Macaroni Co.*, 109 Fed. Supp. 453 (D. R. I.); *In re Gillespie Tire Co.*, 54 Fed. Supp. 336 (W. D. So. Car.).

are, we submit, in accord with the basic philosophy of the Bankruptcy Act as exemplified by this Court's opinion in *Gardner* v. *New Jersey*, 329 U. S. 565, 91 L. Ed. 504. Under traditional bankruptcy law, one who invokes the aid of the Bankruptcy Court by offering a proof of claim and demanding its allowance must abide the consequences of such procedure.

II

Assuming that the Court had jurisdiction, the second question concerns the correctness of the accounting ordered by the courts below. The Referee ordered that the Petitioner return to the Trustee to be placed in the special fund resulting from the liquidation of the Milo inventory, 867,191 lbs. of Milo or the value thereof as a condition precedent to the allowance of its common claim. (R. 23). The court allowed the Petitioner to retain 1,013,159 lbs. of Milo also received by it. There was no appeal from this determination and it is not involved here.

Plainly from the facts appearing in the record and as found by the courts below, Petitioner purchased warehouse receipts from the bankrupt. (R. 181 through 185). Clearly under the facts shown by the record, the warehouseman was short in its Milo inventory and had insufficient Milo to redeem its obligations at the times of the transactions between Petitioner and the bankrupt. (R. 247, 249). Petitioner in its brief filed below in the Court of Appeals recognized these facts and called the attention of the court at pages 4, 7 and 8 to the great shortage in the bankrupt's Milo inventory at all pertinent times as disclosed by the record, Schedule 16. (R. 247, 249).

It has long been recognized that the rights of bailors who make bailment contracts with a licensed warehouseman for the storage of fungible goods, as the Milo with

which we are here concerned, are those of tenants in common with pro rata rights among themselves to the inventory of the warehouseman to the extent there is an inventory up to that amount which will redeem all storage obligations and all bailment contracts. The warehouseman itself may store its own grain in common but has no right to any grain from the inventory except that portion which exceeds the amount necessary to redeem all bailment contracts. No one, whether by the purchase of warehouse receipts or by the purchase of actual grain, can acquire from the warehouseman rights to any grain except that quantity owned by the warehouseman over and above the amount necessary to redeem all bailment contracts. This Court so determined in the early case of *Dows* v. *National Exchange Bank of Milwaukee*, 91 U. S. 618, 23 L. Ed. 214. The Supreme Court of Kansas is in accord in *Moses* v. *Teetors*, 64 Kan. 149, 67 Pac. 526; *Flour Mills of America* v. *Burrus Mills*, 174 Kan. 709, 258 P. 2d 341; *Farmers Grain Co.* v. *A., T. & S. F. Ry. Co.*, 121 Kan. 10; 120 Kan. 21, 245 Pac. 734; *Leslie* v. *Milling Co.*, 109 Kan. 146, 197 Pac. 1094; *Zuber* v. *Minshall*, 123 Kan. 595, 256 Pac. 806.*

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*This accords with the law generally in these United States. *Hall* v. *Pillsbury*, 44 N. W. 673, 43 Minn. 33; *Jackson* v. *Sevatson*, 82 N. W. 634, 79 Minn. 275; *Kastner* v. *Andrews*, 194 N. W. 824, 49 N. D. 1059; *Nieter* v. *McCaull-Dinsmore Co.*, 199 N. W. 85, 159 Minn. 395; *Torgerson* v. *Quinn-Shepherdson Co.*, 201 N. W. 615, 161 Minn. 380; *Barnes* v. *Patrick*, 28 P. 2d 293, 176 Wash. 142; *Carson State Bank* v. *Grant Grain Co.*, 197 N. W. 146, 50 N. D. 558; *Hoven* v. *McCarthy Bros. Co.*, 204 N. W. 29, 163 Minn. 339; *In re Bowling Green Milling Co.*, 132 F. 2d 279 (C. A. 6); 56 *Am. Jur.*, Par. 28, p. 334; par. 167, p. 397; par. 168, p. 398; par. 206, p. 415; *United States* v. *City of Jacksonville*, 167 F. 2d 366 (C. A. 5); 67 *C. J.* 23, p. 456; 24, p. 457, and cases therein cited; *Milliorn* v. *Clow*, 70 Pac. 398, 42 Ore. 169; *W. S. Brown Merc. Co.* v. *Yielding Bros. Dept. Store*, 76 So. 4, 200 Ala. 412; *Graham* v. *Frazier*, 60 S. E. 2d 833, 82 Ga. App. 185, affirmed 66 S. E. 2d 77,

The petitioner admittedly did not deposit any Milo. It therefore could only acquire rights to Milo from the bankrupt warehouseman. The bankrupt warehouseman could not in any manner give Petitioner rights to Milo except to that quantity in excess of the amount necessary to redeem all its bailment contracts. It did not own any such Milo. Therefore the Petitioner could not acquire any rights to the Milo inventory which came into the Trustee's hands. The action of the court below accords with general accounting principles. See *McDonnell* v. *Bank of China*, 33 F. 2d 816 (C. A. 9); 56 *Am. Jur.*, par. 167, p. 397; *Flour Mills of America* v. *Burrus Mills*, 174 Kan. 709, 719, 258 P. 2d 341; *Beeching* v. *Beeching*, 135 Kan. 242, 10 P. 2d 7.

The same result is reached by applying the well recognized equitable principle of subordination entitling the court to subordinate the claim of one creditor to the claims of other creditors in situations where such subordination is necessary to prevent the consummation of a course of conduct by one creditor inequitable as to other creditors. See *Heiser* v. *Woodruff*, 327 U. S. 726, 90 L. Ed. 970; *American Surety Co.* v. *Sampsell*, 327 U. S. 269, 90 L. Ed. 663; *Pepper* v. *Litton*, 308 U. S. 295, 84 L. Ed. 281.

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84 Ga. App. 458; *State* v. *Inter-State Surety Company*, 189 N. W. 679, 45 S. D. 592; *State* v. *Oakley*, 225 Pac. 425, 129 Wash. 553; *Mitchell* v. *Munn Whs. Co.*, 86 P. 2d 174, 59 Idaho 661; 67 *C. J.*, Par. 172, p. 538, par. 173, p. 539 and the cases therein cited; 56 *Am. Jur.*, par. 37, p. 339; *Stutsman* v. *Cook*, 204 N. W. 976, 53 N. D. 162; *State* v. *Farmers Coop. Elevator Co.*, 167 N. W. 223, 39 N. D. 235; *State* v. *Robb-Lawrence Co.*, 115 N. W. 846, 17 N. D. 257; *First Camden National Bank & Trust Co.* v. *J. R. Watkins Co.*, 122 F. 2d 826 (C. A. 3); *In re Harbor Stores Corp.*, 29 Fed. Supp. 749 (S. D. N. Y.); *Whitney* v. *Wenman*, 140 Fed. 959 (S. D. N. Y.); *Sexton-Abbott* v. *Graham*, 4 N. W. 1090, 53 Iowa 181; *State* v. *Broadwater Elevator Co.*, 201 Pac. 687, 61 Mont. 215.

III

The third question concerns the validity of the warehouse receipts purchased by the Petitioner. The question is answered by the applicable Kansas statute set forth in the appendix to this brief. *G. S.* 1949, 34-238 provides for the issuance by a licensed public warehouseman of warehouse receipts to be printed by the state printer. 34-239 provides for the form of such receipts. 34-240 provides for the issuance by a public warehouseman of a receipt on his own grain providing such receipt signifies such ownership and is registered according to the statutory provisions. 34-246 provides that no warehouse receipt shall be issued except upon the actual delivery of grain into store in the warehouse from which it purports to be issued. 34-247 provides for the appointment of a registrar and 34-248 provides for the registration of receipts issued for the warehouseman's own grain.

Obviously the statute provides for two types of warehouse receipts: (1) Ordinary bailment receipts issued to depositors which need not be registered, upon the actual delivery in store of grain; (2) Warehouse receipts issued by the warehouseman itself on grain owned by the warehouseman, which receipts must state such ownership and be registered.

Our question is only whether the warehouse receipts purchased by Petitioner come under either of the two alternatives just indicated. Petitioner did not deposit any grain and therefore can not come under (1) above. The receipts which Petitioner purchased were not registered and did not recite the ownership of the warehouseman and therefore can not come under (2) above. Obviously, therefore, the receipts which it purchased were not valid.

As a matter of law in the State of Kansas, the Petitioner was on notice that the receipts which it purchased

were not valid since it knew such receipts were not registered and did not show that the warehouseman owned grain as the statute required and it knew that it had deposited no grain itself with the warehouseman. See *Wheat Growers Association* v. *Rowan,* 125 Kan. 710, 266 Pac. 101; *Brown Memorial Foundation* v. *Rohrer,* 152 Kan. 291, 103 P. 2d 814; *Scott* v. *Bankers Union,* 73 Kan. 575, 85 Pac. 604; *Kipp* v. *Goffe & Carkener,* 144 Kan. 95, 58 P. 2d 102; *Green* v. *Fortune,* 151 Kan. 598, 100 P. 2d 631; *Shugar* v. *Antrim,* 177 Kan. 70, 276 P. 2d 372.

The Uniform Warehouse Receipts Act does not apply, since there was no negotiation of the receipts and under Kansas law, Chapter 34 and the sections herein summarized and contained in the appendix herein control. See *Kipp* v. *Goffe & Carkener,* 144 Kan. 95, 102, 58 P. 2d 102. The case cited by Petitioner, *Bank* v. *Elevator Co.,* 9 Kan. App. 144, 58 Pac. 483, was decided before the enactment of the applicable statute. Petitioner can not as a matter of law come to this Court in the guise of an innocent purchaser. It obviously knew the admitted fact that it did not deposit Milo and it had to know therefore that the only valid receipts it could obtain under the laws of the State of Kansas where it purchased the receipts had to be registered and show ownership by the warehouseman and the receipts which came into its possession were not registered and did not show such ownership. Petitioner's receipts recited that it had deposited Milo and the warehouseman was not the owner thereof. (R. 37, 115).

IV

In its next question Petitioner asserts that the courts below were required to apply the first in first out rule to the monies in the bankrupt's bank account for the purpose of tracing into the commingled grain fund which came

into the hands of the Respondent the sums paid the bankrupt by Petitioner. This is a secondary question since it pre-supposes facts which would give rise to a right to reclaim property if it could be traced, which is considered under question 5. The first in first out rule is applicable only where all the funds in a bank account are trust funds. See *Bradford* v. *Chase National Bank*, 24 Fed. Supp. 28 (S. D. N. Y.), affirmed 105 F. 2d 1001 (C. A. 2), affirmed 309 U. S. 632, 84 L. Ed. 990. Even here the rule is not applicable where it would produce inequitable results. The principle of equality is equity prevails, particularly in bankruptcy, since it is the very spirit of the Bankruptcy Act. See *Cunningham* v. *Brown*, 265 U. S. 1, 68 L. Ed. 873; *Lowden* v. *Northwestern National Bank & Trust Co.*, 84 F. 2d 847 (C. A. 8); and see *In re Walter J. Schmidt & Co.*, 298 Fed. 314 (S. D. N. Y.).

Petitioner offered no evidence whatever to show that the funds commingled in the bankrupt's sole bank account during the pertinent period, which exceed $1,000,000.00, were trust funds to which the first in first out rule could in any case apply. Petitioner did maintain that its funds constituted trust funds. If it is conceded for the sake of argument that its funds were trust funds and were commingled in the bankrupt's bank account, the rule is that such bankrupt would first spend its free funds and last spend the trust funds. See *Cunningham* v. *Brown*, 265 U. S. 1, *supra*. Petitioner sought to trace its funds from the bank account into the Milo inventory on the dates the sight drafts were written and discounted by the Garden National Bank, November 15, November 29 and December 15 (R. 118 to 120, 121, 123, 131). Petitioner parted with no funds until it issued its own checks in payment of such sight drafts on November 19, December 3 and December 17 (R. 118-120). It obviously could not trace its funds, even

conceding that they were trust funds, until such dates. It made no attempt to trace them thereafter. Petitioner obviously did not trace any of its funds into the hands of the Respondent.

V

In its fifth question presented in an effort to convince this Court that it should grant certiorari, Petitioner asserts that under the uncontradicted evidence, it was entitled to have a constructive trust or equitable lien impressed upon the grain fund which ultimately came into the possession of the Trustee in bankruptcy. The argument on this question is that the Petitioner paid its monies to the bankrupt for the specific purpose and with the understanding that the Bankrupt would purchase Milo and deposit it in its warehouse for Petitioner. As the Court of Appeals noted, at page 43 of its opinion (Petition Appendix "A," page 19) there was no evidence whatever adduced tending to show that the Petitioner paid its money to the bankrupt with such understanding. The record does disclose that Petitioner purchased warehouse receipts (R. 181, 183, 184). It later surrendered receipts and ordered shipments of grain. Evidently it made advance payments to the bankrupt on the purchase price of property to be delivered on demand. There is no evidence that the funds paid were to be held in any separate account and they were in fact commingled with other funds totaling over $777,000 received by the bankrupt from other sources. There is no trust under these facts. See *St. Louis & S. F. R. Co.* v. *Spiller,* 274 U. S. 304, 71 L. Ed. 1060; *In re Gubelman,* 9 F. 2d 486 (C. A. 2); *In re Superior Motor Truck Co.,* 275 Fed. 623 (N. D., Ga.); *In re Seaboard Engineering Co.,* 292 Fed. 106 (C. A. 4); *In re Morris Bros., Inc.,* 282 Fed. 670 (D. Ore.), affirmed

293 Fed. 294; *Queenan* v. *Mayes*, 90 F. 2d 525, 531 (C. A. 10); *In re Pacat Finance Corp.*, 27 F. 2d 810 (C. A. 2); *Great Atlantic & Pacific Tea Co.* v. *Citizens Nat. Bank*, 66 F. 2d 883 (C. A. 3); *Rossman* v. *Blunt*, 104 F. 2d 877 (C. A. 6). There was no trust *res*. Petitioner deposited no Milo and the bankrupt warehouseman owned no Milo which can here be the subject matter of a trust. A mere failure to pay a debt does not create a constructive trust. See *McKey* v. *Paradise*, 299 U. S. 119, 81 L. Ed. 75; *Solomon* v. *Boschulte*, 200 F. 2d 482 (C. A. 3); *In re Whitehall Stores*, 196 F. 2d 667 (C. A. 7); *American Service Co.* v. *Henderson*, 120 F. 2d 525, 530 (C. A. 4).

Not only was there no evidence under which a trust could arise, the record discloses that there was a commingling of the funds paid by Petitioner with other funds in such manner that the property itself was commingled as was its avails. In this situation tracing is not possible. *Pittman* v. *Union Planters Nat. Bank & Trust Co.*, 118 F. 2d 211 (C. A. 6); *In re Morris Bros., Inc.*, 293 Fed. 294 (C. A. 9); *In re Larkin & Metcalf*, 202 Fed. 572 (D. So. Dak.). As the statement of facts herein discloses and as disclosed by the record itself, the purchases of Milo were exceeded by sales of Milo and the Milo inventory of the bankrupt went down drastically from November 14 to the day the petition in bankruptcy was filed. Obviously the remaining inventory belonged to the depositors of Milo and was far less than the quantity necessary to redeem the ordinary bailment contracts.

VI

In a last attempt at posing a situation which would cause this Court to grant its petition, Petitioner asserts that the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for the

exercise of this Court's power of supervision. This argument is based on two statements contained in the opinion of the Court of Appeals: "No physical deposit of grain was made and none was ever intended by the parties." and "The claimant knew that no grain was deposited with the bankrupt for storage, and it knew that the receipts did not indicate on their face that they had been registered." Both statements are contained in the petition Appendix "A," p. 17. Both statements, taken in the context in which they are written, are absolutely true. Indeed the Petitioner wrote itself in its brief filed in the Court of Appeals, on page 22 thereof, "Actually no physical deposit of Milo was made by the Appellant and none was ever intended by the parties." It seems in the poorest of grace to now complain that the Court of Appeals, using substantially the same language as that contained in Petitioner's own brief, departed from the accepted and usual course of judicial proceedings to such an extent that this Court should exercise its power of supervision. As a matter of fact, Petitioner knew it deposited no grain. It also knew from the receipts it purchased that such receipts were not registered since the word "registered" was not stamped on their face. The statements made by the Court of Appeals were manifestly correct. Not being a depositor and not purchasing registered receipts showing the warehouseman's ownership, Petitioner has no rights against the Milo inventory and any quantities it took from such inventory not in excess of that amount necessary to redeem all bailment contracts, were unlawfully received.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

General Statutes of Kansas 1949

Sec. 34-238. Persons who may issue receipts. Warehouse receipts may be issued by any licensed public warehouseman, as herein defined, and must be issued in manner and form as provided by this act, and the form of all receipts shall be approved by the chief inspector of the State Grain Inspection Department. The chief inspector shall be authorized to have printed by the state printer all of the warehouse receipts issued by public warehousemen licensed under this act. All of the expense incurred shall be paid by the State Grain Inspection Department out of the state grain inspection revolving fund, and he shall distribute such warehouse receipts printed to the licensed public warehouses at cost, and the revenue from such distribution shall be by said chief inspector remitted to the state treasurer and credited to the state grain inspection revolving fund in the same manner as other fees collected. It shall be unlawful for any public warehouseman to issue any warehouse receipts for any grain received except upon warehouse receipts furnished by the State Grain Inspection Department on and after June 1, 1939; *Provided,* That nothing in this section shall be construed to affect the legality or validity of any receipt, or receipts, issued under authority of this act if the same contains all the provisions required by section 34-239 of the General Statutes of 1935, and issued before June 1, 1939.

34-239. Form of receipt for storage grain. Every receipt issued for grain stored in a warehouse licensed under this act shall embody within its written or printed terms:

(a) The location of the warehouse where the grain is stored; (b) the statement whether the grain received will be delivered to bearer, to a specified person, or to a specified person or his order; (c) the date of the issuance of the receipt; (d) the rate of the storage charges or the basis for such charges; (e) the net weight and percentage of dockage, together with the grade; (f) the words, nonnegotiable, not negotiable, or negotiable, according to the nature of the receipt, clearly and conspicuously printed or stamped thereon; (g) the signature of the warehouseman which may be made by his authorized agent; (h) if the receipt for grain of which the warehouseman is owner either wholly or jointly, or in common with others, the facts about such ownership; (i) a statement of the amount of the advances made or the liability incurred, for which the warehouseman claims a lien, but if the precise amount of such advances made, or of such liabilities incurred, be at the time of the issuance of the receipts unknown to the warehouseman, or to his agent who issues it, a statement of the fact that advances have been made, or liabilities incurred and the purpose thereof, is sufficient. A warehouseman shall be liable to any person injured thereby for all damages caused by the omission from a negotiable receipt of any of the terms herein required.

34-240. Warehouseman's receipt on own grain valid. Any public warehouseman operating a warehouse in this state may make a valid sale or pledge of any warehouse receipts issued for grain of which the warehouseman is the owner, either solely or jointly or in common with others, and the recital of such ownership in the receipt shall constitute notice to all the world of the right to sell or pledge the same and of the title or specific lien of the transferee or pledgee upon the warehouseman's grain represented by such receipts, provided that said receipts are registered according to the provisions of this act.

34-246. Issuance and cancellation of receipts; division and consolidation. That no warehouse receipt shall be issued except upon actual delivery of grain into store in the warehouse from which it purports to be issued. Nor shall any receipt, or receipts, be issued for a greater quantity of grain than was contained in the lot or parcel so received for storage, nor shall more than one receipt be issued for the same lot of grain, except in cases where a receipt for a part of a lot is desired, and then the aggregate receipts for a particular lot shall cover that lot and no more. In cases where a part of the grain represented by the receipt, or receipts, is delivered out of store and a remainder is left, a new receipt, or receipts, shall be issued in the form and manner as prescribed by the chief inspector, and it shall be stated on the face of the new receipt, or receipts, that such new receipt, or receipts, represent the balance of the original receipt, or receipts, and the new receipt, or receipts, shall bear thereon the number, or numbers, of the original receipt, or receipts, and the original receipt, or receipts, upon which a part of the grain has been delivered shall be canceled in the manner as if all of the grain has been delivered. In case it is desirable to divide one receipt into two or more, or in case it is desirable to consolidate two or more receipts into one and the warehouseman consents thereto, the original receipt, or receipts, shall be canceled in the same manner as if the grain had been delivered from store, and the new receipt, or receipts, shall express on the face thereof that such new receipt, or receipts, represent a part of another receipt or the consolidation of other receipts, as the case may be, and the number and date of the original receipt, or receipts, shall also appear on the new receipt, or receipts, issued in lieu thereof. *Provided,* That no consolidation of receipts differing more than thirty days in date shall be permitted. All new receipts issued for old ones

canceled, as herein provided, shall bear the notation of the date of the receipt or receipts, as originally issued. All receipts issued on grain in special bins, shall bear the number of the bin, and the notation "special bin", and all divisions or consolidations shall bear the bin number of the original receipt, and the notation "special bin". Upon delivery of grain from store upon any receipt issued by a public warehouse, such receipt shall be plainly marked across its face "canceled" with the date and the name of the person canceling the same and thereafter be void and shall not again be put in circulation. No grain shall be delivered twice upon the same receipt.

34-247. Appointment of registrar. The chief inspector may appoint some person, or persons, as registrar of receipts, who shall execute a corporate surety bond to the state of Kansas in the penal sum of $5,000, the sureties to be approved by the chief inspector, conditioned that he well and faithfully discharge all his duties as such registrar of receipts according to law and truly account for and turn over to his successor all moneys, books, files and papers that may come in his hands as such registrar and that he pay all loss and damage that may be sustained by any person or persons by reason of his neglect, failure, or refusal to properly perform the duties of his said office.

34-248. Registration of receipts. It shall be the duty of each and every public warehouseman issuing negotiable receipts upon receipt of any grain, to issue or cause to be issued a receipt thereof, in compliance wth this act, and to by twelve o'clock the following business day, or such time that the chief inspector shall designate, file with the registrar of warehouse receipts designated by the chief inspector, a report as hereinafter provided, and showing the amount of grain received, the name of the owner thereof, and the numbers of receipts therefor issued, accompanied

by the warehouse receipts for registration: *Provided,* That at the option of the chief inspector, a public warehouseman may issue unregistered negotiable receipts for grain of which the warehouseman is not the owner, either solely, jointly or in common with others: *And provided further,* That a public warehouseman must, in all cases, register every negotiable receipt issued by him for grain of which the warehouseman is the owner, either solely, jointly or in common with others. And it shall be unlawful for any grain warehouseman to limit or modify his responsibility imposed by law by any words inserted in any such receipts or by any contract relative thereto. Upon receipt of such report, as hereinafter provided, and warehouse receipts, it shall be the duty of the registrar of warehouse receipts to register such legal receipts in a book to be kept for that purpose and to stamp on each of such receipts with the official state grain inspection department registration stamp the word "registered" with the date of registration and affix his signature thereto.